SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 207

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OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation, *Petitioners and Defendants,*

vs.

WESTERN GEOTHERMAL, INC., a corporation, *Respondent and Intervenor,*

WILLIAM FREE, *Respondent and Plaintiff,*

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of Nevada

Brief of Respondent Western Geothermal, Inc. in Opposition to Petition for Writ of Certiorari

VARGAS, DILLON, BARTLETT & DIXON
JOHN C. BARTLETT
OWEN JAMESON
195 South Sierra Street
Reno, Nevada

Attorneys for Respondent and Intervenor, Western Geothermal, Inc.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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On Petition for Writ of Certiorari to the Supreme Court of Nevada

Brief of Respondent Western Geothermal, Inc. in Opposition to Petition for Writ of Certiorari

Respondent and Intervenor Western Geothermal, Inc. opposes the petition for writ of certiorari upon the ground that it does not present a substantial federal question, and it submits this brief in opposition to that petition.

JURISDICTION

Petitioners claim that this Court's jurisdiction is "believed" to be conferred by 28 U.S.C. § 1257(3) and § 2106. (Peti.*, p. 2)

This Court has no jurisdiction to review under those or any other statutes. Section 1257(3) relates to federal right and question jurisdiction. There is no federal question, much less a substantial one, in this case. Section 2106 merely empowers the Court to act with respect to matters "lawfully brought before it for review." Since this matter is not lawfully before the Court for review, that section is inapplicable.

QUESTIONS PRESENTED†

(1) A Nevada trial court appointed a receiver, under Nevada law, to handle the affairs of a Nevada corporation. The Nevada Supreme Court affirmed that appointment. Then the receiver negotiated a settlement of a claim the corporation had asserted against another. The Nevada trial court found the settlement to be fair, and approved it under Nevada law. Does that approval deny any petitioner anything without due process of law?

(2) The settlement provided, among other things, that the receiver was to assign to another an interest in a lease whose subject was California land. Can a Nevada court appointed corporate receiver make a settlement containing such a term without an ancillary administration in Cali-

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*Petitioners "Petition for Writ of Certiorari to the Supreme Court of the State of Nevada" is referred to as "Peti."

†Petitioners have stated the questions presented by their Petition without reference to the facts presented by it. See Peti., pp. 2-3. Accordingly, respondent has undertaken to state those questions. See Sup. Ct. Rule 40(3). Respondent's question 1 relates to the subject of petitioners' questions 1-3; respondent's question 2 relates to the subject of petitioners' question 4; and respondent's question 3 relates to the subject of petitioners' question 5.

fornia, and, whether he can or can't, does his doing so deny any petitioner anything in violation of any federal constitutional rule?

(3) Do these "procedural discrepancies" (Peti. p. 3), which petitioners don't claim affected the result in any way, deny any petitioner anything without due process of law:

(a) The Nevada Supreme Court's not according the status of appellant to a party not named as appellant in the applicable Notice of Appeal.

(b) The Nevada Supreme Court's refusal to file a part of the record not prepared on time for filing. Petitioners (who do not and did not appear *in forma pauperis*) claim that that tardiness was attributable to the receiver's failure to "make funds available" to pay for that part of the record they wanted filed.

(c) The trial court's failure to grant a continuance of a hearing no one moved to continue. The hearing was to approve a settlement which counsel helped negotiate, to which he never objected, and which he considered to be in his clients' best interest; he did not appear at it because of an injury.

STATEMENT OF THE CASE

In August 1963 Mr. Free, who is one of the respondents in this Court, filed a petition in a Nevada trial court to appoint a receiver for Transcontinental Power Company ("Transcon"), a Nevada corporation in which he owned stock. One of the grounds of the petition was that some directors and officers of Transcon were wasting Transcon's assets. (Peti. pp. 4-5). Those directors and officers, along with Transcon, are the petitioners in this Court.

The Nevada trial court granted Mr. Free's petition and appointed a receiver. That appointment was affirmed by the Nevada Supreme Court three years ago. *Transcon-*

tinental Oil Co. v, Free, 80 Nev. 207, 391 P.2d 317 (1966). No petition for certiorari to this Court to review that affirmance was ever filed, and it is *res judicata.* See Peti., Opinion, App. E, pp. 9, 11-12.*

Before Mr. Free's petition to appoint a receiver was filed, Transcon had become the lessee of a steam lease of lands in the Imperial Valley, California. It had also entered into an agreement with Western Geothermal, Inc. ("Western"), a respondent in this Court, which permitted Western to earn an interest in the lease by drilling wells capable of producing specified geothermal energy.

Western intervened in support of Mr. Free's petition. Transcon counter-claimed against Western, alleging some failures to perform under the Transcon-Western agreement.

Then the receiver was appointed and his appointment affirmed. The receiver, Western and petitioners, all represented by counsel, negotiated a settlement of Western's and Transcon's differences. (Peti., Opinion, App. E, pp. 9-10).

In accordance with Nevada law, the receiver petitioned the Nevada trial court to approve that settlement. (Peti., Opinion, App. E, pp. 13-18) No objection to that petition was ever filed by anyone. The trial court found it to "be for the best interests of the stockholders" of Transcon to make the settlement, which it also found to be "fair and proper . . . so far as . . ." Transcon is concerned. Accordingly, the court approved it. (Peti., App. A,† pp. 1-2)

The settlement provided for Transcon's acceptance of a 20 per cent "carried interest" in the lease of Imperial

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*The Nevada Supreme Court Opinion to which this petition for certiorari is directed is set forth in Appendix E to the Petition, and is referred to as "Peti., Opinion, App. E, p."

†Appendix A to the Petition sets forth the trial court's decision. The decision also found the Agreement to be fair and proper to the Salton Sea Power Company, a party to it, which is not a petitioner in this Court.

Valley lands in lieu of the 40 per cent "working interest" for which the Transcon-Western agreement had initially provided. The owner of a "working interest" has to put up his share of costs in the venture in which he holds the interest; the owner of a carried interest does not have to put up any money in the venture, and takes no risk.* The need for changing Transcon's interest from working to carried arose from the fact that Transcon simply had no money to put up. (Peti., App. C, p. 5; Opinion, App. E, pp. 9-10)

The settlement also provided that Transcon's counter-claim against Western was to be dismissed, which was done, and that Western was to pay the receiver $50,000, which was also done. (Peti., App. B, p. 3; Opinion, App. E, pp. 10-11)

No objection was made to the settlement until after that $50,000 was received by the receiver and disbursed by him. After that happened, petitioners, now represented by different counsel (Peti. pp. 7-8), appealed to the Nevada Supreme Court from the trial court's order approving the settlement their former counsel had helped negotiate (Peti., Opinion, App. E, p. 9). They also appealed from the order dismissing Transcon's counter-claim. The Nevada Supreme Court affirmed those orders, because it saw "no error" in them. (Peti., Opinion, App. E, p. 18)

A petition for rehearing was denied (Peti., App. G, H), and this Petition followed. The Petition attacks the settlement, but it does not challenge the trial court's finding that the settlement was in the best interest of Transcon's stockholders, and was fair to Transcon itself. It does raise a number of other questions, none of which is present, federal or substantial.

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*Petitioners' contention (Peti., p. 7) that a 20 per cent carried interest is "only ½ of a 40 per cent working interest" is therefore untrue.

ARGUMENT

A. First Question

The first question (see petitioners' questions 1-3, Peti. pp. 1-2) is whether the Nevada court's decision approving the settlement agreement, which was negotiated among the court appointed receiver, Western, and petitioners, denies any petitioner anything without due process of law.

The answer is plainly no. The court found the agreement to be fair to Transcon and its stockholders, that finding is not attacked, and that is an end to the matter.

But petitioners say that the question is whether a court can constitutionally "remake the contract between the parties." (Peti., p. 2, questions 1 and 2). The petitioners have in mind the common law rule of construction preventing courts from rewriting contracts the meaning of whose terms are disputed, and requiring instead that courts interpret what the disputed terms mean. (See Peti., pp. 15-16)

A court's failure to apply that common law rule is obviously not a federal question. Anyway, that question is not in this case. The Nevada court was not presented with a construction problem. It was presented with the question whether to approve a negotiated settlement agreement, one of whose provisions respected the modification of an agreement.

Petitioners seem to agree to that proposition, and their claim in fact rests on the contention that the Nevada court could not constitutionally "delegate" to a court appointed corporate receiver the power to negotiate a settlement of a claim the corporation had against another. (See Peti., pp. 2-3, question 3).

That contention is frivolous. Receivers of state corporations appointed by state courts with power to compromise corporate claims have been recognized by federal

courts for years. Indeed, under some circumstances comity requires federal courts to permit state court appointed receivers having that power to compromise to act in preference to federal court receivers who, incidentally, enjoy the same power. See *Commonwealth of Pennsylvania v. Williams*, 294 U. S. 176, 182, and note 1 at pp. 182-84 (1935). See also *Harkin v. Brundage*, 276 U. S. 36 (1928); *Superior Oil Corp. v. Matlock*, 47 F.2d 993 (10th Cir. 1931).

Petitioners try to spice up their contention by alleging that the receiver in this case was "appointed on the application of another party to a lawsuit" and settled "the very litigation in which he was appointed." (Peti., pp. 2-3)

Those allegations don't make this into a federal case, and petitioners cite no authority for the proposition that they do. In any event, they are false. The receiver was appointed on "application" of Mr. Free, not Western, in a proceeding arising out of that application and in which Western merely intervened. That proceeding ended three years ago when the Nevada Supreme Court affirmed the appointment. (pp. 3-4, above) The settlement was made with Western, not Mr. Free. The "litigation" which was settled arose out of a separate counter-claim filed by Transcon in the original proceeding; the fact that it arose out of a separate counter-claim instead of a complaint filed in a separate action is hardly of constitutional significance.

B. Second Question

The second question (petitioners' fourth question) is whether a Nevada court appointed corporate receiver constitutionally can make a settlement providing for assignment of an interest in California land, without an ancillary administration in California.

Petitioners say no because (1) "custom and practice provides for ancillary receivership in jurisdictions where the property is located," and (2) "this rule is protected under the United States Constitution." (Peti., p. 18)

As to proposition number one, custom and practice is precisely the reverse. A statutory corporate receiver, like the receiver in this case, is the successor to all his corporation's powers. Therefore his acts, including those respecting property owned by the corporation and located in a foreign state, are customarily accorded the same recognition in that foreign state that the corporation's own acts are. Accordingly, ancillary administrations in the foreign state are unnecessary, and they are not customary. (See 17 FLETCHER, CORPORATIONS, § 8562; *Relfe v. Rundle*, 103 U. S. 222 (1880); *Converse v. Hamilton*, 224 U. S. 243 (1911); *Clark v. Williard*, 292 U. S. 112 (1933); *Nunn v. Feltinton*, 294 F.2d 450 (5th Cir. 1961), *cert. den.*, 369 U.S. 817 (1962) (holding Illinois receiver's Illinois court approved assignment of Texas real estate valid in Texas.)

As to proposition number two, the constitutional rule is precisely the reverse: Full faith and credit requires one state to recognize the title to property in that state of a statutory corporate receiver appointed by a court of the state where the corporation was organized. *Clark v. Williard*, 292 U. S. 112 (1933).

Petitioners' argument appears to be based in part on a misconception of what the Nevada court and its receiver did. (See the reference to *in rem* proceedings at Peti., pp. 18-19) The court merely approved an agreement by which the receiver agreed to transfer an interest in out-of-state property; it did not purport to determine title to that property. Whatever the rule respecting a court's power to determine title may be, it has been settled for over 50 years

that a court may constitutionally *order* a party before it to transfer title to out-of-state property. The party's "obedience is compelled by proceedings in the nature of contempt." *Fall v. Eastin*, 215 U. S. 1, 11 (1909).

Petitioners' argument is also based upon an upside-down version of the full faith and credit clause. That clause requires the courts of one state *to give effect* to the judgments and laws of another state. (See cases cited at Peti., pp. 16-17). It does not require the courts of one state *not* to give effect to another's laws and judgments. See *Nunn v. Feltinton, supra.*

Therefore, even if California were not required to give effect to the Nevada court appointed receiver's court approved assignment, nothing prohibits California from doing so as a matter of comity—which it certainly would.* *Rozan v. Rozan*, 49 C.2d 322, 317 P.2d 1 (1957).

C. Third Question

The third question (petitioners' fifth question, Peti., p. 3) is whether these three "procedural discrepancies" deprived petitioners of anything without due process of law:

(1) *First discrepancy:* The Nevada Supreme Court did not accord the status of appellant to a party not named as appellant in the applicable Notice of Appeal.

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*Petitioners cite some California cases (Peti., p. 18) for the proposition that according to California law foreign states have no jurisdiction to determine title to, or to permit receivers to alter title to, California property. Those cases involved "chancery receivers," rather than statutory corporate receivers, as to which the rules are entirely different. See cases cited at p. 7, above. Furthermore, California holds that even though a foreign judgment may not determine title to California property, the judgment ought to be followed as a matter of comity to the extent it determines the rights in the property of the parties who were before the foreign court. *Rozan v. Rozan, supra.* The Nevada court's approval of the settlement agreement did not purport to do anything more than that. See pp. 8-9, above.

Only parties named in the "notice of appeal are brought within the appellate court's jurisdiction," *Cook & Sons Equipment, Inc. v. Killen,* 277 F.2d 607, 609 (9th Cir. 1960), and therefore not according an unnamed appellant an appellant's status is perfectly proper. See also Fed. Rules Civ. Pro., Rule 73(b); Peti., App. G, pp. 20-21.*

Moreover, petitioners do not claim that the Court's action in anyway prejudiced them, nor could they. First, because the Court considered the issues anyway (Peti., App. G, p. 20). Second, because counsel who argued the appeal was counsel to all appellants, including the unnamed one (Peti., p. 8), and presumably presented to the Court all points and arguments he considered pertinent to those issues.

(2) *Second discrepancy:* The Nevada Supreme Court refused to file a part of the record not prepared on time for filing.

Petitioners claim that that refusal was wrongful because the reason for their tardiness was the receiver's failure "to make funds available." (Peti., p. 3)

There is no constitutional rule, and petitioners point to none, requiring one party to litigation—a receiver or anyone else—to make funds available to another to process an appeal. Certainly there is no such rule where the party wanting funds does not appear *in forma pauperis;* petitioners did not appear in that form in either Nevada court, and they don't here.

In any case, petitioners don't claim that inclusion of the omitted portion of the record would or might have changed the result, and therefore any error in that regard was harmless.

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*Appendix G sets forth the Nevada Supreme Court's decision denying petition for rehearing.

(3) *Third discrepancy:* The Nevada trial court failed to continue a hearing no one moved to continue.

Petitioners claim that that failure was wrongful because petitioners' former counsel was hospitalized at the time of the hearing and the Court knew it. (Peti., p. 3)

The hearing was on the petition to approve the settlement which hospitalized counsel had helped negotiate. Counsel had not filed an objection to that petition (and no one else ever did—see pp. 4-5, above). He had in fact become "convinced" that the settlement "was the best possible arrangement." (Peti., App. C, p. 6*)

Therefore counsel was apparently *for* approval of the settlement, not against it.† Petitioners don't claim otherwise. His failure to appear to argue *for* the settlement which petitioners, through new counsel, attack in this Court, was their good fortune, not grounds for complaint.

Moreover, granting continuances is a matter for the trial court's discretion, and failure to grant one does not raise a due process question. *Cf. Glasser v. Wessel,* 152 F.2d 428 (2d Cir. 1945), *cert. den.*, 328 U. S. 839 (1945).

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*Appendix C sets forth the trial court's ruling denying a motion to vacate judgment.

†Significantly, on February 25, 1965, counsel filed a motion to continue a trial, based on an affidavit dated February 23, 1965. The hearing was set for February 26, but counsel never moved to continue it. See Record on Appeal, Vol. II, p. 384; Peti., App. C, p. 6.

CONCLUSION

Transcon and Western settled their differences over two years ago. The Nevada trial court found that settlement to be fair to Transcon and its shareholders. Petitioners do not claim that it wasn't fair. The questions that they raise are not federal, and they do not concern anyone. The parties have work to do drilling that California land, and they should be permitted to get on with it unhindered by this litigation. The petition should be denied.

Respectfully submitted,

VARGAS, DILLON, BARTLETT & DIXON
JOHN C. BARTLETT
OWEN JAMESON
195 South Sierra Street
Reno, Nevada
By OWEN JAMESON
Attorneys for Respondent and Intervenor, Western Geothermal, Inc.